STATE OF MICHIGAN

COURT OF APPEALS

JAMES P. SAYED,

Plaintiff-Appellant,

v

PATRICIA J. SAYED,

Defendant-Appellee.

UNPUBLISHED
August 7, 2008

No. 275293
Macomb Circuit Court
LC No. 2005-002655-CK

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Plaintiff brought this action against defendant, his former wife, for breach of contract and unjust enrichment after he allegedly loaned her $25,000 that she failed to repay. At the conclusion of plaintiff's case at a bench trial, the trial court granted defendant's motion for a directed verdict. Plaintiff thereafter filed a motion for a new trial, which the court denied. Plaintiff now appeals as of right. We affirm.

I. FACTS

Plaintiff was unavailable on the day of trial. Therefore, defendant was the only witness who testified. Defendant admitted that on May 21, 2002, she sent plaintiff an email that stated:

> Jim,
>
> I have a favor to ask . . . . . can you spare $20,000.00? I don't know when I'd be able to pay you back . . . . . not for a long while.
>
> Pat

Plaintiff responded to the email by answering, "yes." Defendant admitted that when she sent the email, it was her intent to pay plaintiff back and believed from plaintiff's response that he had accepted her offer on those terms. Defendant testified that she needed the money because she incurred a lot of debt because of her divorce from plaintiff, of which plaintiff was aware, and that she was considering filing for bankruptcy. A few days after defendant sent the email, she saw plaintiff at their son's baseball game and plaintiff gave her a check for $20,000. According to defendant, plaintiff told her that the check was "for you and the kids. It's a gift. I don't want it back. It's your money to begin with."

Approximately a year later, defendant received an additional $5,000 from plaintiff that she neither expected nor asked for. Defendant testified that plaintiff arrived at her house one evening, handed her an envelope, and told her that it was for her and the children and to open it only after he left. Plaintiff later asked defendant to sign some documents indicating that they had an agreement that she would repay the money to him, but she never signed the documents.

At the conclusion of plaintiff's case, the trial court granted defendant's motion for a directed verdict, finding that plaintiff failed to prove that a contract for defendant to repay the money she received from plaintiff was ever established.

II. MOTION FOR DIRECTED VERDICT

Plaintiff argues that the trial court erred in granting defendant's motion for a directed verdict.[1] We disagree.

A. Standard of Review

In a bench trial, a motion for a directed verdict is properly reviewed as a motion for involuntary dismissal under MCR 2.504(B)(2). "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), quoting MCR 2.504(B)(2); see also *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 235-236 n 2; 615 NW2d 241 (2000).

MCR 2.504(B)(2) permits a trial court to make findings of fact when ruling on a motion for involuntary dismissal. A trial court's findings of fact in a bench trial are reviewed under the clearly erroneous standard. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 329-330.

B. Analysis

The trial court determined that plaintiff failed to establish a valid, enforceable contract for a loan agreement. The essential elements of a valid contract are "'(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.'" *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742

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[1] We limit our analysis to the $20,000 payment made in May 2002, as plaintiff does in his brief on appeal. Although plaintiff asserts that it was his position at trial that the $5,000 payment was solicited in the same manner and under the same terms as the $20,000 payment, no evidence factually supporting this position was presented at trial. Plaintiff does not otherwise address the trial court's dismissal of his claims with respect to the $5,000 payment; therefore, we conclude that any issue involving the $5,000 payment has been abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

(2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The burden is on the plaintiff to prove the existence of the contract sought to be enforced. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992).

A valid contract requires mutual assent or a meeting of the minds on all essential terms. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006). A meeting of the minds is decided by applying an objective standard by looking at the express words of the parties and their visible acts, not their subjective states of mind. *Id*. at 454. A mere expression of intent does not create a binding contract. *Kamalnath, supra* at 549.

In order for an alleged agreement to be enforced as a contract, the elements of the contract must be apparent or capable of ascertainment. *Linnen v Ken Brown Leasing Corp*, 5 Mich App 394, 397; 146 NW2d 719 (1966). To be binding, a contract must be definite and certain regarding the material elements. See *Band v Hazel Park Dev Co*, 337 Mich 626, 628; 60 NW2d 333 (1953). However, courts may still enforce contracts that are indefinite in certain situations. Indefiniteness and uncertainty may be removed by subsequent acts or agreements of the parties. *Id*. In some cases, the court may supply missing terms.

> Even though important terms of the contract were indefinite the trial judge acted properly in supplying the necessary additions. In an appropriate case an agreement may be enforced as a contract even though incomplete or indefinite in the expression of some term, if it is established that the parties intended to be bound by the agreement, particularly where one or another of the parties has rendered part or full performance. Where the price is indefinite, the purchaser may be required to pay and the seller to accept a reasonable price. Where the time of performance is indefinite, performance may be required to be rendered within a reasonable time. Each case will turn on its own facts and circumstances. See 1 Corbin on Contracts, §§ 95, 96, 99, 102; 5 Williston on Contracts, § 1459; 1 Williston on Contracts (3d ed), §§ 36, 36A, 40, 41, 49; Restatement, Contracts, § 5. [*J W Knapp Co v Sinas*, 19 Mich App 427, 430-431; 172 NW2d 867 (1969).]

The trial court determined that any agreement between the parties was too indefinite and uncertain to establish an enforceable loan agreement. We agree. Even if defendant's email can be viewed as initially manifesting an intent to repay plaintiff $20,000, there was no clear manifestation of what was required of defendant to perform under the alleged agreement. There was no evidence establishing a meeting of the minds with regard to repayment terms, such as interest rate, periodic versus lump sum repayment, the amounts, or when repayment would be required. The trial court found that before the final terms of any loan agreement were negotiated or agreed upon, plaintiff told defendant that the money was a gift to her and the children, and he did not want it back.

Although uncertainty regarding time of performance can sometimes be cured by judicially imposing a requirement that performance occur within a reasonable time, *J W Knapp Co, supra*, the facts and circumstances surrounding the alleged agreement here were too indefinite and uncertain to enable the court to determine what would be reasonable. Defendant's initial email indicated that she was not sure when she would be able to repay the money, and no other evidence manifesting an agreement on a timeframe for repayment, or other terms of repayment, was presented. This case is distinguishable from *J W Knapp Co, supra* at 429, 432,

in which the parties agreed to repayment of a debt over 36 months, and the uncertainty involved the appropriate rate of interest. Therefore, we conclude that the trial court did not err in finding that the evidence in this case failed to establish mutuality of assent on all material terms to establish an enforceable contract.

Plaintiff argues that defendant's claim that the money was given to her as a gift involves an alleged modification of their original contract, which is unenforceable because it was not supported by independent consideration. The trial court did not reach this issue, having found that plaintiff failed to establish an enforceable contract in the first instance. We agree that the trial court did not err in finding that an enforceable contract was never established; therefore, it is unnecessary to consider the question of modification.

III. UNJUST ENRICHMENT

Plaintiff alternatively argues that the trial court erred in dismissing his unjust enrichment claim. Again, we disagree.

A. Standard of Review

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996). Further, whether a party has been unjustly enriched is generally a question of fact. But whether a claim for unjust enrichment can be maintained is a question of law, which this Court reviews de novo. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

B. Analysis

Unjust enrichment consists of (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of defendant's retention of that benefit. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007). If unjust enrichment exists, the law will imply a contract in order to prevent the unjust result. *Id.* A contract may be implied under this theory only if there is no express contract. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992).

The trial court found that plaintiff was not entitled to recover under an unjust enrichment theory in light of defendant's testimony that the money was intended as a gift. Defendant was the only witness who testified at trial. She testified that plaintiff gave her a check for $20,000 and told her, "It's a gift. I don't want it back. It's your money to begin with." Plaintiff did not testify at trial or present any evidence contradicting this testimony. Therefore, the trial court did not err in accepting defendant's testimony that plaintiff gave her the money and informed her that it was a gift, which he did not want back. Under these circumstances, defendant's retention of the money is not unjust. Accordingly, the trial court did not err in dismissing plaintiff's unjust enrichment claim.

IV. IMPLIED-IN-FACT CONTRACT

Plaintiff also argues that the trial court erred in dismissing his claim for a contract implied in fact. We disagree.

A. Standard of Review

Again, a trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Mahrle, supra* at 351.

B. Analysis

Plaintiff relies on *Erickson v Goodell Oil Co, Inc*, 384 Mich 207, 211-212; 180 NW2d 798 (1970), and *Sutton v Cadillac Area Pub Schools*, 117 Mich App 38, 45; 323 NW2d 582 (1982), for his implied-in-fact-contract theory:

> A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding, of men, show a mutual intention to contract. *In re Munro's Estate* (1941), 296 Mich 80 [295 NW 567]. A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. *Miller v. Stevens* (1923), 224 Mich 626 [195 NW 481]. The existence of an implied contract, of necessity turning on inferences drawn from given circumstances, usually involves a question of fact, unless no essential facts are in dispute. See 100 CJS, Workmen's Compensation, § 611. [*Erickson, supra*.]

The trial court found that even if defendant originally intended to borrow money from plaintiff, the lack of any mutual agreement regarding the terms of any loan precluded a claim for breach of an implied contract. We find no error. As previously discussed, there was no evidence indicating when and how defendant was expected to pay plaintiff back. Further, the trial court found that when plaintiff gave the money to defendant, he told her that it was a gift and did not need to pay it back. This circumstance negates the existence of an implied contract to repay the money. Accordingly, the trial court did not err in dismissing plaintiff's claim for breach of an implied contract.

V. MOTION FOR SUMMARY DISPOSITION

Finally, we reject plaintiff's argument that the trial court erred in denying his pretrial motion for partial summary disposition under MCR 2.116(C)(10).

A. Standard of Review

We review a trial court's decision on a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

B. Analysis

The trial court did not err in denying plaintiff's motion. The parties submitted competing affidavits regarding the circumstances under which defendant received the money from plaintiff and whether the parties understood that defendant was expected to repay the money as a loan. "[S]ummary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind." *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). The trial court properly determined that there were genuine issues of material fact that precluded summary disposition.

Affirmed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Bill Schuette